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*April 18,19.
*June 12.

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

ELSIE BARCLAY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence — Railway accident — Shunting cars — Warning — Proof of negligence.

B, in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock, on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, Gwynne J. dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line.

APPEAL from the decision of the Court of Appeal for Ontario affirming the verdict at the trial in favour of the plaintiff.

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*PRESENT :—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

The facts of the case are sufficiently set out in the above head-note, and more fully in the judgment of the majority of the court delivered by Mr. Justice Sedgewick.

Riddell Q.C. and *Coburn* for the appellant. The company cannot be compelled to place watchmen on the highway to warn the public; *Canadian Pacific Railway Co.* v. *Notre-Dame de Bonsecours* (1); *Madden* v. *Nelson & Fort Sheppard Railway Co* (2); and has no legal right to do so; *Battishill* v. *Humphreys* (3); *Hickman* v. *Maisey* (4).

Wilson Q.C. and *Gundy* for the respondent, referred to *Cox* v. *Great Western Railway Co.* (5); *Slattery* v. *Dublin, Wicklow & Wexford Railway Co.* (6); *Blake* v. *Canadian Pacific Railway Co.* (7); *Hollinger* v. *Canadian Pacific Railway Co.* (8).

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—The respondent is the widow and administratrix of David Barclay, late of Ridgetown, Ontario, and the appellants are a railway company operating a railway between Ridgetown and Walkerville. On the 9th of September, 1898, Barclay was driving towards his home in Ridgetown, between nine and ten o'clock in the evening. In order to reach his home he had to cross the appellant company's railway tracks by means of a level crossing on Victoria Avenue. As he was in the act of driving along the street his carriage collided with a moving passenger car and he was killed.

(1) [1899] A. C. 367.
(2) [1899] A. C. 626.
(3) 64 Mich. 494.
(4) 16 Times L. R. 274.
(5) 9 Q. B. D. 106.
(6) 3 App. Cas. 1155.
(7) 17 O. R. 177.
(8) 21 O. R. 705; 20 Ont. App. R. 244.

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His widow brought an action against the company under Lord Campbell's Act and recovered a verdict for $3,000, $2,000 of which was allotted to herself, and $500 to each of her minor children

The questions submitted to the jury and the answers thereto will indicate the nature of the issue in the present case:

(1). Were the defendants guilty of any negligence which caused the accident? Yes.

(2). If they were, in what did such negligence consist? We agree that a man should have been on the crossing when making that switch to warn the public.

(3). Could the deceased have avoided the accident by the exercise of reasonable care? No.

(4). If the plaintiff is entitled to damages, at what sum do you assess them? Divide the amount at which you assess them between the widow and children in such proportion as you think proper.

To the widow	$ 2,000 00
To the boy Lawson, 9 years old	500 00
To the girl Jeannette, 7 years old	500 00
Total damages assessed	$3,000 00

Judgment was entered upon these findings, and an appeal to the Court of Appeal for Ontario was dismissed by a unanimous judgment, from which judgment an appeal is taken to this court.

Ridgetown is the eastern terminus of the railway and Victoria Avenue was east of the station. The evening train had arrived at Ridgetown a few minutes before the accident, and was composed of an engine and tender, a baggage and a passenger car. It was necessary to turn the train for the western trip, and also to pick up a passenger car which was standing upon the siding. After some switching the train was arranged with the engine and tender at the east, in the front, followed by the two passenger coaches and the baggage car. In this order it proceeded eastward on the main line to cross Victoria Avenue, as the engine

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and tender had to go to the round house and the cars to the main line north of the round house; the train was started, then the coupling between the tender and the cars being disconnected the engine proceeded at an increased speed, and the cars followed at the original speed, one brakesman going with the engine that he might turn the round house points to the main line for the cars after the engine had gone down the round-house switch, another brakesman remaining on the train in front, or east end of the front passenger car. The deceased, I gather from the evidence, must have seen, or at all events heard, the engine and train approaching before the cars were separated from the engine, but he did not in all probability see or notice the fact of such separation, and after the engine had passed the crossing, he was noticed driving his horse and carriage slowly across the track without noticing the cars coming on behind, and having no notice of the approaching cars, and it being impossible in the short time to stop the cars, the fatal accident occurred. There was some evidence to show that owing to piles of lumber on the company's lands at the point in question, his vision of the train was necessarily obstructed, and there was also evidence to show that the train was not sufficiently manned. There was, as the jury have found, no watchman at the crossing. The jury found that the appellants' negligence consisted in their failure to have a man on the crossing at the moment of the accident. The learned counsel for the appellants endeavoured at the argument to make it appear that the only question raised in this case was as to whether it is to be left to a jury to determine if a railway company can be compelled to place a watchman upon level highway crossings to warn persons about to cross the line and rail. I do not consider that any such broad ques-

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tion is raised here at all. The respondent's counsel do not make any such contention. It was, I think, properly left to the jury to determine whether or not in this particular case where, late on a dark night, at the terminus of a railway, shunting was being carried on, and that of an excessively dangerous character (the process being that of a running or flying switch), at a place in a town thickly populated, and over a much frequented avenue or highway, there being no engine connected with the train colliding with the carriage, and none of the usual signals such as the blowing of whistles or the ringing of bells to give warning to passers by, it was not necessary, at that particular time and under those particular circumstances, to take greater precautions than they really did take, and to be much more careful than in ordinary cases where these conditions did not exist. There was, in my view, a clear case to submit to the jury, and I entirely concur in the judgment of the learned Chief Justice of the Court of Appeal in delivering the judgment of that court.

The appeal should be dismissed with costs.

GWYNNE J. (dissenting.)—The respondent brought an action as administratrix of her deceased husband, one David Barclay, against the appellants for damages occasioned by the death of her said husband who was killed by a train of carriages of the defendants upon a main line of the defendants, as it crosses Victoria Avenue in the town of Ridgetown, by reason as is alleged of the negligence of the defendants' servants in charge of the said train. The acts of negligence relied upon in the plaintiff's statement of claim as negligence which caused the death of the deceased are as follows :

1st. That the defendants negligently and carelessly allowed cars and obstructions to stand near to the crossing so as to obstruct the view of persons using the said highway and passing the said crossing.

2nd. That they carelessly and negligently left the said crossing without fence or gates and without watchmen or signals.

3rd. That they negligently used the said highway and crossing as a place for switching and shunting, handling and driving cars in a dangerous manner ; and

4th. That as the said David Barclay was approaching the defendants' said track, a steam engine of the defendants under the charge and control of defendants' servants was driven very rapidly and with a great deal of noise and commotion along the main track across said Victoria Avenue immediately in front of him and in such a manner as to attract his attention thereto, and when the said engine had crossed Victoria Avenue, and while the said David Barclay was crossing the main track of the defendants, in rear of the said engine, and before he could get clear of the said track, a number of coaches of the defendants under the charge and control of defendants' servants were *negligently, suddenly, at a rapid and dangerous speed driven across the said Victoria Avenue,*

and the statement of claim concludes by alleging that by reason of such negligence the said David Barclay was struck by the buffer or platform of the forward car and was instantly killed. Issue having been joined upon a plea of not guilty the case was brought down to trial before a jury.

Upon the main question essentially necessary to have been established, namely, whether the defendants were chargeable with any negligence to which the collision which caused the death of the deceased could fairly and reasonably be attributed, there was no contradiction whatever in the evidence which was as follows :

At about 9.30 o'clock on the night of the 9th of September, 1898, a passenger train of the defendants arrived from the west at Ridgetown station and shortly afterwards proceeded eastwardly along the main line across Victoria Avenue to take the engine to an engine or round house which was situated at

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the distance of between 700 and 800 feet east of Victoria Avenue, and to leave three cars which were being hauled by the engine upon the main track to a point north and east of a switch situated east of Victoria Avenue, and which led down northeasterly from the main line to the engine house so as to place these three cars in proper order for the being taken on the passenger train going west on the following morning. The station house from which these carriages and engine proceeded is situated at a distance of over 600 feet west of Victoria Avenue. When the engine with the carriages had proceeded to a point distant about the length of three cars from the western limit of Victoria Avenue the engine was separated from the carriages and proceeded ahead at a somewhat increased speed so as to reach the switch leading down to the engine house in time to enable the engine to pass down and to have the switch placed so as to let the coaches following pass on to their destination on the main line. The evidence showed the length of the company's passenger coaches to be 57 feet, so that the point where the engine became separated from the coaches was, according to the only evidence upon the subject, situate just about 171 feet from the west limit of Victoria Avenue, and according to the like evidence the engine proceeded from thence, fully lighted as required by law, and ringing its bells and going at a speed not exceeding six miles an hour, while the carriages followed with the speed previously given at a rate of about four miles an hour. The evidence further showed that Victoria Avenue was 100 feet in width. Thus this evidence, which as I have said was the only evidence upon the subject, establishes as a fact that when the engine had reached the centre of Victoria Avenue, or the distance of 221 feet from the place where it had dropped the carriages,

the carriages had proceeded the distance of nearly 150 feet and the front carriage had reached a point about 21 feet west of the avenue, and upon the same calculation, before the engine had completely crossed the avenue the front carriage had entered upon and traversed about eight feet of the avenue. Then the uncontradicted evidence also established that this front car and also the third were fully lighted throughout and that a man stood on the front of the first car as it proceeded east, with a lighted lamp, standing on the platform in front of the open door of the car throwing light all round, while he himself leaned over the front of the car on the lookout as they approached the crossing, and when about a car length or 57 feet from the crossing he by the light proceeding from the cars saw a horse and rig coming up in the darkness, for the night was dark, from the south, on the avenue towards the railway; and then he hallooed to the person in the rig whom he did not see, to look out, in a voice quite loud so that he could have been heard by the person in the rig if he was paying any attention. In expectation that the person in charge of the rig would stop his horse upon being so warned the cars proceeded. The horse however was not stopped, but proceeded walking up towards the railway and was not even stopped when it reached the south track of a siding which was situate about twelve feet south of the main track; upon reaching this siding the horse and rig were quite close to the carriages running on the main line, but proceeded across the siding and entered upon the main line directly in front of the carriages when the collision immediately occurred and the man in the rig was instantly killed. At what distance from the railway the horse and rig were when the man on the front carriage gave the alarm and hallooed to the occupant of the rig to look out

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did not appear, but it is obvious he was near enough to have heard the alarm as the only evidence upon the point states it to have been given, and it is absolutely inconceivable that he could have failed to see the approaching carriage which was fully lighted, and the light from which had enabled the man who gave the alarm upon the front carriage to see the horse coming up in the darkness; but when the horse and rig reached the siding south of the main line the south rail of which was about 12 feet south of the main line nothing short of the maddest recklessness of the man driving the horse and rig can account for his not having then stopped and so have prevented the happening of the collision, unless indeed he was asleep or otherwise incapable of taking care of himself, for the evidence shows him to have been in perfect health and having no defect either in his hearing or his eye-sight. Almost all the time occupied in the trial was naturally taken up in an attempt made on behalf of the plaintiff to explain this apparently very negligent and careless conduct of the deceased by an effort to establish that his apparent apathy was attributable to his not having seen the approaching carriages by reason of a car and other things standing, as was alleged, on the railway premises between the deceased in his rig and the approaching carriages; but assuming there to be any thing in the contention all its force, if any, became irrelevant for it was wholly vested upon the assumption of the deceased, (in order that he should have been so prevented from seeing the lighted coaches) being at points on the avenue further south than the point where he was when the man in the first carriage saw the horse coming up in the darkness and gave the alarm as stated by him. From that point until the collision took place there was nothing whatever inter-

vening which could have prevented the deceased seeing the lighted coaches if he had been using his faculties as it was his duty to do. The declaration admits that the engine was driven across the avenue "with a great deal of noise and commotion," and in a manner sufficient to have attracted the attention of the deceased, and there was not a particle of evidence reasonably to explain the apathetic conduct of the deceased. That this was the opinion entertained by the learned trial judge appears from his charge to the jury upon this branch of the case wherein, after referring to the evidence of the man on the first carriage as to his having seen the horse coming up and to his having shouted an alarm in the manner testified by him, the learned judge proceeded as follows:

Now you know how quickly a horse can be stopped that is going two miles an hour—that is walking at a slow walk. Why did not that man stop his horse? Was there anything on earth to prevent him if he had been looking out? Just think of that. You are bound by your oaths to determine this case by the evidence. Now, can you find any reason on earth why that man should not have stopped his horse ten feet away from the track before the train came along. If he might have done it, then you should answer the question that is put to you "that he could by reasonable care have avoided the accident." If you can find any reason in the world in order to account for his not having stopped it, consistently with the exercise of reasonable care under the circumstances, then of course you will consider it, *but I myself cannot suggest to you any reason now for his not stopping, when you take* (into consideration) *his duty which is a duty to look out when he comes to a railway crossing.*

Now, the learned judge having entertained this opinion, I must say that I think he should not have submitted any question to the jury as to the deceased having been or not having been guilty of contributory negligence but should have told the jury that upon the evidence the only conclusion that reasonable men could arrive at was that the deceased by his own carelessness, indifference or recklessness had either

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wholly caused or had at least contributed to the causing of the collision which resulted in his death, in either of which cases the defendants were entitled to judgment in their favour. In the recent case of *The Halifax Electric Railway Co.* v. *Inglis* (1) I have cited several of the numerous cases which bear upon this point. The learned judge however submitted the following questions to the jury, namely :

1st. Were the defendants guilty of any, and if any, what negligence, which caused the accident ?

2nd. Could the deceased have avoided the accident by the exercise of reasonable care ?

These questions the jury answered by saying that they found the defendants guilty of negligence *in not having a watchman at the crossing to warn the public*, and they answered the question as to contributory negligence of the deceased in the negative.

The answer of the jury to the first of these questions absolves the defendants from all charge of negligence which caused the collision, unless the not having had a watchman at the crossing constituted such negligence. Now there is no legislative provision requiring the defendants to have a watchman at the crossing. Parliament has, by the statute 51 Vict. ch. 29 sec. 187, vested in the Railway Committee of the Privy Council the power and duty to determine whether or not and when it shall be necessary for a railway company to maintain in the interest of the public safety a watchman where the railway crosses a public highway, and to make an order to that effect if they shall deem it to be expedient. Such order when made has statutory obligation. No such order has been deemed to be necessary or been made by the Committee of the Privy Council in relation to the crossing under consideration in the present case, and

(1) 30 Can. S. C. R. 256.

the defendants are under no obligation to maintain a watchman at such crossing unless the obligation is imposed by the common law. All that the common law requires is that the defendants should give such warning of approaching trains as should be reasonably sufficient to attract the attention of travellers on the highway so as to enable them to make use of their faculties to avoid all danger, and in view of the warning given, as appears in the uncontradicted evidence, both by the voice of the person standing for that purpose in front of the first carriage, and by the light proceeding from the lighted up carriages which was abundantly sufficient to attract the notice of the deceased, if he had been, as he ought to have been, paying attention, which warning appears to have been wholly disregarded by him, no jury acting as reasonable men who duly appreciated the nature of their duty as jurors can be justified in finding that *the collision was caused* by there not having been a watchman at the crossing, whose warning, if one had been there, might have been equally disregarded, as was the warning which was given. The fact of there not having been a watchman at the crossing cannot, notwithstanding the finding of the jury, be accepted in law under the circumstances as constituting negligence which caused the collision.

Then as to the answer of the jury to the question relating to contributory negligence of the deceased it can only be attributed to sympathy with the plaintiff in her no doubt grievous loss, for there is not in the evidence anything to support it. The judgment in appeal appears to me to sanction the introduction of a new principle in the determination of actions of the nature of the present one, namely, that however sufficient to attract the attention of travellers upon a highway crossed by a railway upon the level the

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warning given by the railway company may be, and however recklessly and carelessly the traveller may disregard such warning, nevertheless if a collision should take place and the traveller should suffer, and if a jury should be of opinion that some other mode of warning might by possibility have been more effectual in arousing the traveller to the proper exercise of his faculties, it would be quite competent for the jury to pronounce the not giving of such possibly effective warning to be negligence in the company which caused the injury, and to acquit the injured person of having by negligence on his part contributed to the happening of his injury.

The appeal should in my opinion be allowed, and the action dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Coburn.*

Solicitor for the respondent: *W. E. Gundy.*